British Irish
RIGHTS WATCH

RESPONSE TO GOVERNMENT CONSULTATION PAPER ON RETURN TO TRIAL BY JURY

FEBRUARY 2000

SECTION 1

INTRODUCTION

1. The Committee on the Administration of Justice, Liberty and British Irish Rights Watch were given consent by the Court pursuant to Rule 37 paragraph 2 of the Court's Rules of procedure jointly to submit comments in the case of John Murray v UK.

2. The intervenors were instructed to limit their comments to the following matters:
1. with regard to both the issue of access to lawyers and the right to silence, an analysis of the standard demanded of the State by Article 6 by reference to other international standards on the right to a fair trial and domestic standards in other jurisdictions; and
2. the importance of access to lawyers and the right to silence in the context of the adversarial system in general and the Diplock Court system in particular.

3. The President of the Court requested the intervenors to make every effort to avoid overlap with two other intervening parties, Amnesty International and JUSTICE. All three intervening organisations have liaised in order to comply with this request. As a result, this submission, while making some reference to the first issue defined above, particularly insofar as the domestic standards in other jurisdictions is concerned, has concentrated in particular on the second issue identified by the Court, because the submission made by Amnesty International, which we respectfully adopt, deals in detail with international standards on the right to a fair trial.

4. This submission therefore adopts the following structure:

   Section 1 comprises this introduction.

   Section 2 deals with the importance of the right of silence in the adversarial system in general, relates its significance to the relevant international standards, and compares the situation in the United Kingdom with that in three other comparable domestic jurisdictions.

   Section 3 and **Annex A** analyse the importance of the right of silence in the Diplock Court system in particular, by reference to an analysis of the jurisprudence that has arisen in the Northern Ireland jurisdiction.

   Section 4 considers the importance of access to lawyers in the context of the adversarial system in general and the Diplock Court system in particular, and analyses the interrelationship of the issue of access to lawyers with that of the right to silence.

5. The Committee on the Administration of Justice (CAJ) is an independent civil liberties group with a membership drawn from all

sections of the community in Northern Ireland. It is an affiliate of the International Federation of Human Rights and is working to secure the highest standards in the administration of justice in Northern Ireland. The Committee has produced a number of publications on human rights with regard to the conflict in Northern Ireland. On the issues dealt with in this case CAJ has prepared submissions to the United Nations Committee Against Torture and the European Committee for the Prevention of Torture. Along with Justice, the UK affiliate of the ICJ, CAJ also produced a report on the Northern Ireland experience of recent changes to the right to silence.

6. Liberty (the National Council for Civil Liberties) is a leading human rights and civil liberties organisation and has monitored the state's response to terrorism since it was first set up in 1934. Liberty has published a number of books and pamphlets on emergency legislation and the conflict in Northern Ireland and with its sister organisation, the Civil Liberties Trust, has commissioned a number of research projects in this area. The Trust has also produced a publication on the importance of the right to silence. During the deliberations of the Royal Commission on Criminal Justice Liberty organised expert seminars on the right to silence and made detailed submissions to the Commission itself on both that issue and the importance of access to lawyers during questioning by police.

7. British Irish Rights Watch is an independent non-governmental organisation that monitors the human rights dimension of the conflict in Northern Ireland. Its services are available to everyone, whatever their community or affiliations, who alleges that their human rights have been violated as a result of the conflict. It seeks to promote the proper observance of international human rights standards by government organisations by means of monitoring, training and research. Much of its work has been concerned with the right to a fair trial in Northern Ireland and in particular it has produced reports on access to legal advice and the right to silence. It has also submitted evidence to the Royal Commission on Criminal Justice on the right to silence and to a fair trial in Northern Ireland, and to the United Nations' Special Rapporteurs on the Right to a Fair Trial.

8. This submission has been prepared by staff of the three organisations, and has benefited from the expert assistance of Nicholas Blake QC, and Mary McKeone, barrister, who practise in England, and Professor John Jackson of the Faculty and School of Law at the Queen's University of Belfast, to all of whom we wish to record our gratitude.

SECTION 2

THE IMPORTANCE OF THE RIGHT OF SILENCE IN THE ADVERSARIAL SYSTEM

Introduction

9. In this case, the issues arise in the context of inferences drawn against the applicant at his trial for failing to disclose information to the police when first questioned in the absence of his solicitor, and his subsequent failure to give evidence in his own defence when called upon to do so.

10. Other commentators have drawn to the Court's attention provisions of other international instruments relevant to the minimum standards of criminal procedure that add up to a fair trial[1] particularly, the International and Civil and Political Covenant that refers specifically to the right not to be compelled to testify against oneself or confess guilt, and the observations of the Court in Funke [2] that similar considerations inform the concept of a fair trial under the ECHR.

11. As a starting point for a review of the case law relevant to the common law tradition, we submit that international obligations establish:-
    a) there is a presumption of innocence in a criminal trial and accordingly the burden remains on the state authorities to prove guilt[3];
    b) that the burden cannot be discharged by evidence of admissions or confessions obtained as a result of compulsion: whether the compulsion constitutes torture or inhuman or degrading treatment, or some other measure of national law that penalises those who refuse to give evidence on their own behalf[4];
    c) there is a clear right to a lawyer to assist in the conduct of the defence in the determination of a charge[5]; this may well require access to a lawyer to be given at an earlier stage in the proceedings, where important decisions fall to be made by the suspect as to his response to an accusation, that affect the conduct of the trial.

12. In the present context, the problems of the formulation of the international standards for a fair trial, focus on three issues:-
    i) does the risk of an adverse inference for failure to testify constitute compulsion within the meaning of Article 14 ICCPR?

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1 Amicus Brief filed on behalf of Amnesty International
2 Case Funke v France 25/2/1993 Series A 256 para 44
3 Article 6 para. 2 ECHR
4 ICCPR 14 (3) (g)
5 Article 6 para. 3(c) ECHR; ICCPR 14 (3) (b) and (d)

ii) does the denial of access to a lawyer by a suspect in pre trial custody, adversely affect the fairness of the trial, when strong inferences were drawn against the accused from his failure to give an explanation to the police at a time when he had been denied legal advice?

iii) does the drawing of inferences of guilt from a failure to answer questions pre trial or give evidence at trial amount to an interference with the principle of the burden of proof and the presumption of innocence?

13. This Memorial endorses the view of the majority of the Commission as to ii), and the dissenting opinion of Mr Loucaides as to iii). If the Court were to find that the use of the 1988 Northern Ireland Order derogates from the presumption of innocence and the principle of the burden of proof, it would equally constitute a form of unfair pressure on suspects and those accused of offences to give information pre trial and give evidence at trial. It is submitted that this case raises fundamental issues concerning the role of the right of silence in guaranteeing the right to a fair trial, especially in the adversarial context. In our submission, the right of silence is central to the right to a fair trial in that it lays the foundations on which lie the presumption of innocence, the privilege against self-incrimination, and the right of any accused person to escape conviction unless the case against him or her is proved beyond reasonable doubt.

The common law tradition of trial

14. In the common law tradition, criminal litigation is conducted between opposing parties in a trial presided over by a judge, before the tribunal of fact, that normally consists of the jury, but in particular jurisdictions, the role of the jury has been modified or eliminated in certain cases[6]. It is fundamental to the system, that the accused has to prove or establish nothing. The burden is on the prosecution to establish guilt beyond reasonable doubt, or so that the tribunal of fact is sure of guilt.

15. The function of the trial judge is concerned with the fairness of the trial, rather than the nature of the criminal investigation. The judge has no power to direct what avenues of inquiry are pursued, who should be charged and what charges should be brought. Those are matters for the prosecuting authority and its legal representatives[7]. There is no pre trial judicial inquiry with the assistance of the accused. The response of the accused to the allegations emerges in four ways:-

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6 e.g. Northern Ireland where Diplock Courts operate in relation to scheduled offences; Singapore which abolished jury trials in 1969

7 R v Sang [1980] AC 402

a) by replies to any pre trial questions administered by the police, if he or she decides to answer those questions;
b) by any formal admissions of fact agreed for the purposes of the trial between the prosecution and the defence;
c) by any questions put to witnesses for the prosecution on his or her behalf;
d) by any evidence given by the accused at trial, if it is decided to give evidence.

16. Guilt to the criminal standard is established if the prosecution produce relevant admissible evidence accepted by the tribunal of fact as reliable and persuasive that satisfies every requirement of the law as to the elements to be proved in a particular offence to the requisite criminal standard. There is a case to answer against the accused, if the prosecution produce some evidence. The reliability of the evidence, however, is to be assessed by the tribunal of fact and so a case will proceed, even if it contains significant evidential inconsistencies, provided a case to answer has been established[8]. It is then for the tribunal of fact to conclude what inferences are to be drawn and what weight is to be attached to the evidence. In trials by jury the verdict is the general one of guilty or not guilty and no reasons can be given or inquired into.

17. There is no legal duty on the police to inform the accused at the outset of the investigations of all the evidence that has been obtained or the reasons that have led to the accused being suspected of an offence. The accused must merely be informed of what offence he or she is suspected [9]. One of the difficult tasks faced by legal advisers who attend at police stations in pre trial investigations, is to discover from the police the full nature of the suspicions against the suspect, and give advice on such a response accordingly.

18. Where an accused person gives evidence, it is treated in the same way as evidence from any other witnesses in the case. It is given on oath; a refusal to answer could give rise to penalties for contempt; a false answer could give rise to penalties for perjury[10]. There is one significant difference between the position of witnesses and accused

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8 R v Galbraith (1981) 2 All ER 1060 . It is to be noted that a recommendation from the Royal Commission on Criminal Justice 1993 (Cmnd 2263) para.s 41 - 42 that would give the trial judge powers to withdraw a case from the jury has not been adopted by the Government.

9 International obligation requires that an arrested person be informed of the reasons for arrest [ECHR Art 5(2); ICCPR Art 9(2).] This is not the same as the details of the case against the person. English law confines the requirement to identify the offence suspected, and even suspicion of terrorism may be enough. Further the ECrtHR held in Margaret Murray v UK Case 13/1993/408/ 28th October 1994, that reasons for suspicion of the offence did not need to be given on arrest or immediately thereafter

10 Archbold Criminal Pleading, Evidence and Practice 1994 Vol. 2 para.s 28 - 126; R v Wheeler 12 CrAppR 159

persons, however: witnesses do not have to answer questions which would incriminate themselves in a criminal offence, accused persons have no such protection[11].

19. Before the passing of the Northern Ireland Order 1988 and the similar provisions enacted in the Criminal Justice and Public Order Act 1994 (not yet in force) in England and Wales, there is no doubt that the international principles of fair trial were given effect by the "golden thread" throughout the legal system that the burden of proof lays on the prosecution, and it is not for the defence to prove or establish anything[12].

20. However, the common law did not regard the principle of the burden of proof, or its consequences in terms of the limitations on adverse comment, as unwelcome invasions of legal technicality with the natural inferences of common sense. Of course, any tribunal of fact will take cognisance of the fact that a prosecution case is uncontradicted by evidence from the defendant, or that a defence now relied on was not revealed earlier[13]. Defendants in those circumstances deprive themselves of a powerful argument in support of their case which is presented to the jury. The contrast is particularly notable in a joint trial where one defendant gives evidence and another does not. The defendant who has been consistent in an exculpatory account and who gives evidence about it is in that sense better off. But the absence of a forensic advantage does not mean that the prosecution can adopt the empty space left by the defendant's failure to answer or testify and make it part of its own case[14]. The common law inferences were strictly limited therefore and did not extend to enabling a failure by one party to litigation to call evidence or answer questions at an early stage of an investigation, to corroborate or support the case of another. The accused is not required to assist the prosecution in establishing or eliminating grounds for charging a criminal offence[15].

21. There are many reasons why a person who is not guilty of a crime may not wish to give direct evidence of their innocence, yet alone a premature exculpation to potentially hostile police investigators. The following examples are some of the most frequent:-

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11 S.1 Criminal Evidence Act 1898; Archbold (op. cit.) Vol. I para.s 8 - 145

12 Woolmington v DPP (1935) AC 462

13 Further, there are particular rules which permit evidence to be adduced of a failure to respond to an allegation of crime made before arrest: R v Christie (1914) AC 545; and since some statutes require "reasonable excuse" to be raised by the defendant, e.g. Prevention of Crime Act 1953, s. 1 (1)

14 Hall v R (1971) 1 WLR 298.

15 Rice v Connolly (1966) 2 QB 414
Lord Parker stressed '.....it seems to me quite clear that though every citizen has a mandatory or if you like a social duty to assist the police there is no legal duty to that effect, and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority.

a) the prosecution case may be weak and given by disreputable witnesses. The true focus of the defence case may be that the prosecution witnesses are incapable of belief, rather than a contest between witnesses for defence and prosecution.

b) the defendant may have a criminal history and associates, which will place his or her evidence in bad light. Such defendants may be bad witnesses from the point of view of their ability to come across in the witness box to the Tribunal of fact and make a favourable impression.

c) a defendant may have lied, exaggerated or omitted facts from an unthinking response to an allegation of serious crime. A devastating impression can be created by skilled cross examination, but may have little relevance to the question of who did what.

d) giving evidence may expose others, to criminal liability or public opprobrium. These may be family members, lovers, friends or associates;

e) giving evidence denying one offence may expose the defendant to an admission of other offences unknown to the state;

f) a co-accused may already have given evidence from which another defendant can benefit without testifying himself;

g) a defendant may already have compromised himself by failing to answer police questions because of cultural norms within his community; for example, many young black people in Britain would be very reluctant to do so.

22. Allied to the principle of the burden of proof, are the rules rendering confessions inadmissible if they were brought into existence as a result of threats or inducements by persons in authority in the conduct of the investigation. The present law, enabling the police to put across to the suspect that he or she "must" give an account if they are not to be prejudiced, undermines free choice, and may lead an innocent person to give a false account that may seem more credible to the authorities in order to relieve him of her of the pressure imposed by a failure to give a response that the law apparently requires[16], or may compel him to incriminate himself.

The changes to the common law position

16 R v Parris, Miller and others (1993)

23. The origin of the legislative changes in Northern Ireland and England, can be traced to the 1972 11th Report of the Criminal Law Revision Committee[17], whose draft Bill formed the model for the Northern Ireland Order and was previously used by the Government of Singapore to reform its penal code. The 1972 proposals were extremely controversial at the time, and were not adopted by the Government of the day in the light of the hostility they provoked from the legal community, including Dr Simon, one of the distinguished former judges consulted by the Committee as to relevant French law [18]. It is to be noted that two later Royal Commissions on criminal procedure did not endorse these proposals[19] and other means have been identified of reducing unfairness to the state by an undisclosed or ambush defence[20]. Neither the CLRC in 1972, nor the Privy Council in a 1982 case reviewing the Singapore Ordinance directed themselves to the provisions of the ICCPR and considered whether the inferences of guilt the legislative changes sought to create constituted a compulsion to testify[21].The proposals were formulated at a time before the dangers of uncorroborated evidence, and/or police corruption in the fabrication and manipulation of evidence were in the forefront of public debate. The Report remains an unconvincing basis for a domestic account of the essential requirements of a fair trial in international law.

24. It will be seen from the brief review above, that before the 1988 changes the common law did not prevent certain inferences being drawn by the tribunal of fact in weighing the strength of the prosecution case and the absence of any reply to it, but those could only be drawn at the conclusion of the case when an independent decision had been taken that there was a sufficient case to answer, and the inferences could not never go as far as a general conclusion that silence meant guilt or corroborated any other evidence of guilt. By contrast the Order inextricably destroys the burden of proof in a criminal trial at common law:

    i) Article 3 of the NI Order (following the CLRC recommendation) provides that a failure to answer questions from the police, can be taken into account in deciding whether there is a case to answer[22]

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17 Criminal Law Revision Committee (1972) 11th Report, Evidence, General HMSO Cmnd 4991.

18 See The *Right to Silence* by Susan M. Easton, published by Avebury, 1991

19 Report of the Royal Commission on Criminal Procedure (1981) HMSO Cmnd 8092
Report of the Royal Commission on Criminal Justice (1993) HMSO Cmnd 2263 para.s 49 - 56

20 Pre trial disclosure was the preferred approach of the Report of the Departmental Committee on Fraud Trials (1986) and the Royal Commission on Criminal Procedure(1981) para 57

21 Tau v Public Prosecutor (1982) AC 136

22 This Article was not considered by the House of Lords in Murray (1994) 1 WLR 1, where they considered that the requirement of a prima facie case was a safeguard for fair trial.

ii) the effect of the inferences that can be drawn if either the accused does not give evidence or gives evidence of parties not previously mentioned to the police, is to support or corroborate the prosecution case.

Although the case law on the Order provides that guilt cannot be established solely by lack of response to an accusation, once silence can be taken to support a weak prosecution case to enable a case to answer to be established, and once a tribunal of fact is entitled to feel sure about convicting because of silence by a suspect or an accused, the accused face trial under a new regime of uncertain application, where they can not know the case against them because they can never be certain until conviction what inferences will be drawn against them and why.

Other common law jurisdictions

Canada

25. These concerns are not peculiar to the United Kingdom. The same basic principles apply throughout the common law jurisdictions. An exhaustive account of these other jurisdictions is not possible within the confines of this brief, but it is to be noted that in Canada the right of an accused to remain silent on arrest and at trial is an integral element of their adversarial system. The right of silence originally governed by the common law rules is now conferred by s. 7 of the Canadian Charter on Rights and Freedoms[23]. The privilege of an accused against self-incrimination is enshrined in s. 11(c) of the Charter[24] and imparts a right to an accused to choose whether to testify or remain silent. Further s. 10(b) of the Charter requires that an accused on arrest is informed of his right to consult counsel and is permitted to do so without delay[25].

26. The right to remain silent from its earliest recognition was designed to shield a defendant from the unequal power of the Prosecution. A person whose liberty is in jeopardy cannot be required to give evidence against himself but rather has a choice whether to exercise that right or to waive it. In Clarkson v R[26], Wilson J. stated that any waiver '.....was dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with the full knowledge of the rights the procedure was enacted to protect and the effect the waiver will have on those rights in the process.'

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23 S.7 provides '....everyone has the right to life liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

24 S.11(c) provides '....Any person charged with an offence has the right not to be compelled to be a witness in proceedings against the person in respect of the offence.

25 See McLachlan J. in Hebert v R 47 BCLR (2d) 1

26 See Clarkson v R (1986) ISCR 383

27. No inference may be drawn at trial by the jury from the failure of an accused to give an explanation to the police in interview[27]. Similarly no inference of guilt may be drawn, by the jury in relation to an accused's failure to testify. McLachlan J. commented in Hebert v R [28] that protection conferred by a legal system which grants a defendant immunity from incriminating himself at trial but offers no protection in respect of pre-trial statements is illusory.

USA

28. A suspect's right to silence in the U.S. criminal justice procedure exists both pre-trial and at trial. Indeed, the right has a constitutional foundation in the Fifth Amendment[29] of the Constitution which states that:

> "No person... shall be compelled in any criminal case to be a witness against himself."

The Supreme Court in the landmark case of Miranda[30], reaffirmed the importance of the pre-trial right to silence and the right of an accused to make an informed choice whether to exercise that right. The Court stated that:

> "The privilege against self-incrimination which has a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual the 'right to remain silent unless he chooses to speak in the unfettered exercise of his own free will' during a period of custodial interrogation as well as in the courts or during the course of other official investigations."

Following Miranda[31], the suspect being held in custody could not be questioned in the absence of his lawyer unless he had been warned of his right to silence and his right to counsel and had expressly waived those rights. Admissions obtained in violation of the requirements result in automatic exclusion by the courts[32]. With regard to the right of silence at trial, no adverse comment may be made by the court on the accused's decision not to testify[33]. The problem of late disclosure has been dealt with by the rules of court requiring exchange of witness statements pre-trial.

Australia

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27 See R v Hansen (1988) CCC (3d) 504

28 See footnote 25

29 The Fifth Amendment has its foundations in the English common law: see, for example, NY v Quarles (1984) 467 U.S. 649, 673; Ferguson v State of Georgia (1960) 365 U.S. 570; Ullman v U.S. (1956) 350 U.S. 422, 428

30 Miranda v Arizona (1966) 384 U.S. 436

31 Ibid

32 But see recent decisions of Rhode Island v Innis (1980) 446 U.S. 291, Moran v Burbine (1986) 475 U.S. 412 (in these cases the court adopted a more narrow interpretation of the Miranda guidelines and procedures)

33 Griffin v California (1965) 380 U.S. 609

29. In Australia the right of an accused not to answer questions during the investigative pre-trial process and the right of an accused not to testify at trial have their origins in the privilege against self-incrimination. The pre-trial right to silence was firmly established by rule 5 of the English Judge's Rules 1912[34]. With regards to an accused's right of silence at trial each of the Australian jurisdictions have statutory provisions based upon the Criminal Evidence Act 1898 (U.K.)[35]. An accused's right to legal advice on arrest is governed by statutory provisions in some states and the Judges Rules (which do not have the force of law) in other states.

30. The view adhered to by the Australian Courts is that a suspect is entitled not to answer questions put to him by the police or others in authority. No adverse inference may be drawn at trial by an accused's pre-trial sentence[36]. In Petty and Maiden v R[37] the majority of the Australian High Court held that to allow adverse inferences to be drawn from an accused's silence during the investigative process ".....would be to erode the right of silence or to render it valueless." The High Court further held that where a defence is raised by an accused for the first time at trial, and the accused had remained silent prior to trial no inference adverse to the accused may be drawn from that fact. Their Honours stated:

> "The denial of the credibility of that late defence or explanation by reason of an accused's earlier silence is just another way of drawing an adverse inference (albeit less strong than an inference of guilt) against the accused by reason of his exercise of the right of silence. Such an erosion of the fundamental right should not be permitted. Indeed in a case where the positive matter of the explanation or defence constitutes the real issue of the trial to direct the jury that it was open to them to draw an adverse inference about its genuineness from the fact that the accused had not previously raised it would be to convert the right to remain silent into a source of entrapment."

31. In each of the Australian states with the exception of New South Wales and Victoria[38] the judge may but is not bound to comment on the accused's silence at trial[39] . Varying degrees of weight may be attached to an accused's silence depending upon the

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34 Rule 5 Judges Rules 1912-1918 required that suspects be cautioned by advising them that they are not obliged to say anything unless they wish to do so but that anything which they say may be taken down in writing and may be used in evidence. See R -v- Jeffries (1946) 47 S.R. (N.S.W.) 284

35 See Section 1(1) Criminal Evidence Act 1898

36 See R -v- Ireland (1970) 126 CLR 321

37 Petty and Maiden -v- R (1991) 173 CLR 1995

38 No comment is permitted by a Judge under the New South Wales and Victoria jurisdictions.

39 R -v- Bathurst (1968) 2 QB 99

circumstances of the case. However such silence does not amount to an admission of guilt, nor corroboration[40]. In conclusion the Report of the Australian Law Reform Commission on Evidence (1987)[41] recommended no change in the existing law surrounding the right of silence.

Comparison with inquisitorial modes of trial

32. The principles of the burden of proof and the absence of compulsion to give evidence, clearly depend on the overall structure of the applicable legal system. In those legal systems where the investigation of the offence is conducted to some significant extent by a judicial authority, where the accused does not give sworn evidence but identifies the issues in dispute by pre trial answers to the prosecution's evidence, and where the procedure admits no distinction between a prima facie case before the accused is called on to make a response, comparisons with the common law system above cannot be properly made for the purpose of discovering applicable international standards. The authors of this Memorial are not qualified to review the particular measures in other European states which give effect to the presumption of innocence, the burden of proof, and the rules against using involuntarily statements.

33. However, we note that the trend in most European systems, consistent with the developing case law from this Court, has been to strengthen the protection for the accused in the criminal process: for example by the principle of equality of arms which requires access to a lawyer to be afforded at important moments in the process in order to avoid accounts being obtained in police detention by unfair means.

34. Furthermore, the criminal justice systems of other European countries encompass express protections for the right to remain silent and for non-self-incrimination. For example, the Italian Criminal Procedure Code (1988) provides that suspects have the right to remain silent and the police must inform them of this right before questioning them[42]. If this warning is omitted, evidence so obtained is inadmissible[43]. The Italian Supreme Court of Cassation has ruled that the Court is prevented from drawing adverse inferences from a suspect's silence[44]. Similarly, the Spanish Constitution safeguards the right of a suspect not to incriminate him or herself[45], while Spanish law on criminal justice protects the right to remain silent[46].

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40 See R -v- Carrie & Watson (1904) 20 TLR 365
41 ALRC Report No. 38 Evidence (1987)
42 Article 64, section 3, Codice di Procedura Penale
43 Ibid, article 178
44 Court of Cassation, Section 1, May 13th 1982
45 Article 24.2
46 La Ley de Enjudiciamento Criminal, article 520.2 (a)

Conclusion

35. If the right of silence is eroded, the burden of proof is irreversibly shifted until the balance lies against the accused, who can no longer rely on the presumption of innocence, and is forced to answer questions and/or to testify, even though to do so is not in his best interests and may amount to self-incrimination, in order to prevent the drawing of inferences, however unfair or unwarranted. In Northern Ireland, where the right of silence has been abrogated since 1989, many allegations of miscarriages of justice have arisen because of the operation of the Order. Furthermore, the focus of criminal trials has shifted away from an evaluation of the prosecution case to an examination of the defendant's reasons for remaining silent. The impact of similar rules in England and Wales, especially in the context of jury trials, where it will be impossible to know what inferences, if any, have been drawn from silence, will do extensive damage to the right to a fair trial.

SECTION 3

THE RIGHT OF SILENCE IN PRACTICE IN THE DIPLOCK COURTS

38. At Annex A we include a paper by Professor John Jackson of the Queen's University of Belfast which examines in detail the jurisprudence of the Northern Ireland courts in cases involving the drawing of adverse inferences from a person's silence. In this section, his paper is summarised[47].

39. The Criminal Evidence (Northern Ireland) Order contains four specific restrictions on the right of silence.
    a) Article 3 permits a court or jury to draw inferences from the failure of an accused to mention any fact relied on in his defence when being questioned by a constable trying to discover whether or by whom an offence was committed or on being charged if the fact was one which in the circumstances existing at the time the accused could reasonably have been expected to mention when questioned or charged.
    b) Article 4 permits a court or jury to draw inferences from an accused's refusal to testify or answer questions.
    c) Article 5 permits a court or jury to draw inferences from the failure of an accused to account for the presence of objects, substances or marks on his person, clothing or possession or in any place in which he is at the time of his arrest when a constable reasonably believes that these are attributable to his participation in an offence and he is asked by the constable to account for them.
    d) Article 6 allows inferences to be drawn when a person has failed to account to a constable for his presence at or about the time an offence for which he has been arrested is alleged to have been committed and the constable reasonably believes that his presence is attributable to his participation in the offence.

40. Articles 5 and 6 require that suspects are cautioned about the consequences of a failure or refusal to account for relevant matters and Codes of Practice under the Police and Criminal Evidence (Northern Ireland) Order 1989 and under the Northern Ireland (Emergency Provisions) Act 1991 require that persons are cautioned when arrested about the consequences of failing to mention facts under Article 3. Article 4 requires the trial judge to warn defendants at trial of the consequences of refusing to testify.

[47] For names and references to cases cited, please see Annex A

41. Although the Order does not legally compel suspects or defendants to answer police questions or to testify, it creates a mechanism for compulsion on suspects and defendants to do so. Furthermore, quite apart from the psychological pressure which the cautions are bound to create in the mind of the suspect or defendant, the legal consequences of failure to answer questions or to testify are considerable.

42. First of all, the Order permits inferences to be drawn under Articles 3, 5 and 6 at three different stages of the criminal process:
    i) in determining whether an accused should be committed for trial;
    ii) in determining whether there is a case to answer at trial; and
    iii) in determining the question of guilt.

43. Second, the Order permits inferences to be drawn in a wide range of circumstances. Articles 4, 5 and 6 permit inferences to be drawn directly from a refusal to answer or testify. Article 3 only permits inferences to be drawn when some fact is later relied on in defence of the accused at trial. But it is clear that a failure to mention the fact at the very early stage of arrest may prejudice an accused, even if he does later answer police questions. Moreover, the Northern Ireland Court of Appeal has held that a fact may be relied on in defence at trial even though neither the defendant nor a witness called on his behalf has given evidence of that fact. All that would seem to be necessary to bring the Article into play is for the defence to suggest a fact of assistance to the defence.

44. Third, judicial interpretation of the Order has enabled judges to draw strong adverse inferences against an accused, including in appropriate cases an inference of guilt. The Order provides no statutory guidance on the kind of inferences that may be drawn in the circumstances provided for. It merely states that a court or jury may draw such inferences as "appear proper" and on the basis of them treat silence as corroboration of any evidence against the accused. The Northern Ireland Court of Appeal and the House of Lords have taken this to mean that in each case it is up to the individual trier of fact (judge or jury) to apply ordinary common sense. The refusal to answer questions or give evidence does not by itself indicate guilt but where common sense permits it it is proper in an appropriate case to draw the inference from the refusal to answer or testify that there is no reasonable possibility of an innocent explanation and for the drawing of this inference to lead on to the inference of guilt.

45. Judicial reaction to the Order was cautious at first. After the introduction of the Order the prosecution invited the judge in a number of Diplock cases to apply Article 4 and draw inferences from a refusal to testify but judges declined to do so. In certain cases involving the possession of firearms and explosives judges commented that they were not prepared to use the Article to

bolster up a weak case. In one judgment it was held that a failure to testify may justify a finding of guilt where the weight of the prosecution evidence just rests on the brink of the necessary standard of proof. The result of this caution was that at first the judges were only prepared to draw inferences in certain very specific circumstances, in particular where other evidence strongly suggested guilt.

46. However, this initial caution soon gave way to a willingness to draw ever wider inferences from silence. For example, in R v McLernon[48] the trial judge drew a most unfavourable inference from the accused's failure to answer police questions, namely that no innocent explanation was available to him, and he drew from the refusal to testify the inference of guilty knowledge of the offence. The judge concluded:

> "The Article is in the widest terms. It imposes no limitation as to when it may be invoked or what result would follow if it is invoked."

He went on to say that in certain cases a refusal to give evidence under the Article may well in itself, with nothing more, increase the weight of a prima facie case to the weight of proof beyond reasonable doubt:

> "It would be improper and quite unwise for any court to set out bounds on whether to draw inferences or not in an individual case and the nature, extent and degree of adversity if it decides to draw inferences."

This line was developed in subsequent judgments, until the test as to whether inferences should be drawn from silence degenerated to one of mere common sense.

47. The operation of the Order in practice has affected the situation of not only suspects and defendants, but also the prosecution and the judiciary. So far as suspects and defendants are concerned, grave legal consequences may attach to a refusal to answer questions or to testify. At the same time the effect of answering questions or testifying may be to lead the suspect or accused into incriminating himself. It is unfair to put suspects and defendants in such a position where they are denied basic procedural safeguards. First, there is no requirement that police interviews with suspects be taped with the result that there is no independent record of what was said. Secondly, the Northern Ireland Court of Appeal has held that inferences may be drawn from silence even when the suspect has been denied legal advice. Thirdly, there is no requirement that the suspect be provided with information about the case against him before he is cautioned. Suspects must have in mind an eventual, although in the majority of cases hypothetical, trial before knowing what the case is against them and often without the benefit of any legal advice.

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[48] R v McLernon Belfast Crown Court, 20 December 1990; Court of Appeal, 1 April 1992

48. The operation of the Order as a whole has in practice eased the burden on the prosecution to prove the defendant's guilt. The Order has the effect of requiring defendants to testify in order to avoid inferences being drawn from their failure to do so. Such a regime undermines the presumption of innocence and effectively reverses the burden of proof.

49. The requirement on the trial judge to warn defendants of the consequences of silence also compromises the traditional "umpireal" role of the judge in the adversarial trial. This is particularly the case in Diplock trials where the trial judge actually determines the question of guilt. In issuing the warning, the judge ceases to preside impartially over the proceedings and becomes an adjunct of the prosecution. Even if justice is capable of being done in such circumstances, it is unlikely that it will ever be seen to be done. The judge's role is further compromised by the Order in that the "common sense" approach which is to be adopted when deciding what inferences are to be drawn provides no guidance on how to decide whether to draw inferences and what inferences to draw, leaving judges to make essentially subjective judgements on the basis of negative evidence, in the sense that silence is the absence of testimony. Although judges in Diplock trials have to give reasons for their decisions, they do not have to canvass the possibility of innocent explanations in their judgments and they do not have to spell out the precise inferences they have drawn from silence. Apart from this, there are grave risks in permitting tribunals to draw "common sense" inferences of guilt on the basis of such equivocal evidence as silence. Furthermore, the abrogation of the right of silence has introduced great uncertainty into the system of criminal justice. Neither the accused nor his advisers know what inferences, if any, will be drawn by the trial judge, nor the degree of adversity which will attach to those inferences, and such a subjective regime will inevitably vary from one judge to another.

50. In conclusion it is argued that the Criminal Evidence (Northern Ireland) Order has created unfairness in two crucial respects. First, it has put suspects under pressure to incriminate themselves in conditions of unfairness. Second, it has eroded the principle of the presumption of innocence under which suspects shall be presumed innocent until proved guilty beyond reasonable doubt, and has effectively reversed the burden of proof.

SECTION 4

THE IMPORTANCE OF ACCESS TO LAWYERS IN THE ADVERSARIAL SYSTEM AND IN THE DIPLOCK COURTS

International standards on access to lawyers

51. Once again, we respectfully adopt the submissions made by Amnesty International in their intervention.

Access to lawyers under English law

52. Under English law access to a solicitor is governed by s. 58 Police and Criminal Evidence Act 1984 and the Codes of Practice[49] made under it. Section 58 entitles a person subject to certain exceptions[50] to consult with a solicitor at any time if he so requests. In R v Samuel[51] the Court of Appeal quashed the defendant's conviction for armed robbery on the basis that the trial judge had been wrong in deciding that the refusal of access to a solicitor had been justified. Hodgson J. commented ".....In this case this appellant was denied improperly one of the most important and fundamental rights of a citizen"[52].

53. Saville J. emphasised in R v Walsh[53] that the main object of s. 58 of the Act ".....is to achieve fairness to an accused...so as among other things to preserve and protect his legal rights. To our minds it follows that if there are significant or substantial breaches of s. 58 then prima facie at least the standards of fairness set by Parliament have not been met. So far as a defendant is concerned it seems to us to admit evidence against him which has been obtained in such

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49 Delay in a request for access to a solicitor is only permitted:
S.58(6) (a) in the case of a person who is in police detention for a serious arrestable offence; and
(b) if an officer of at least the rank of Superintendent authorises it.
S.58(8) .....an officer may only authorise delay where he has reasonable grounds for believing that granting a suspect access to a solicitor
(a) 'will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons or
(b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
(c) will hinder the recovery of any property obtained as a result of such an offence.
Code C:4 under Annex B allows a maximum of 36 hours delay after the relevant time as defined by S41 of the Police and Criminal Evidence Act (save in cases where the person is detained under the Prevention of Terrorism Act)

50 See Code C:6 and C:11:2 in particular and Code C: Annex B

51 R v Samuel (1988) QB 615

52 See also R v Olipant (1992) Crim L R 40 and R v Chung 92 Cr. App R 314

53 R v Walsh 91 Cr.App.R.161

circumstances where these standards have not been met cannot but have an adverse affect on the fairness of the proceedings."

54. The improper denial of access to legal advice can indeed affect the admissibility of confession evidence. If a defendant alleges that a confession was obtained by oppression or in consequence of anything likely to render the confession unreliable, it will not be admissible unless the prosecution proves to the court beyond reasonable doubt that it was not so obtained notwithstanding that it may be true[54]. The court can also refuse to allow prosecution evidence in the light of the circumstances in which it was obtained[55]. The courts have frequently excluded confession evidence obtained after access was denied or delayed in breach of s. 58[56].

55. Access to legal advice is regarded as an integral aspect of the criminal justice system under English law. Although the Prevention of Terrorism (Temporary Provisions) Act 1989 applies throughout the United Kingdom, in England and Wales no distinction is made between those suspected of terrorist offences and any other suspect when it comes to access to lawyers. It is generally agreed that access to legal advice is not only a crucial safeguard for the civil liberties of suspects, but is essential to the smooth running of the criminal justice system and the courts. This was emphasised in the case known as that of the R v Miller and Others[57], in which a suspect confessed to a murder he did not commit despite the presence of his solicitor during police interviews. In their judgment, the Court of Appeal underlined the need for access to effective legal advice:

> "It is of the first importance that a solicitor fulfilling the exacting duty of assisting a suspect during interviews should follow the [Law Society's] guidelines and discharge his function responsibly and courageously."

Access to lawyers in the Diplock Courts

56. Access to lawyers is equally vital to the functioning of the Diplock Courts. However, there are a number of factors peculiar to the Diplock Courts which make access to lawyers all the more crucial, including:

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54 Police and Criminal Evidence Act 1984, s. 76(2)

55 Ibid, s.78

56 See, for example, R v Paul Deacon [1987] Crim LR 404, R v Eric Smith [1987] Crim LR 579, R v Cochrane [1988] Crim LR 822, and R v Parris [1989] Crim LR 214 CA

57 R v Miller, Paris and Abdullahi, Court of Appeal, 16.12.1992

(a) the existence of legal provisions permitting prolonged detention without production before a judge or other legal authority;
(b) the fact that detainees in the Diplock system are held incommunicado;
(c) oppressive conditions in detention;
(d) a lack of safeguards against ill-treatment and improper pressure on or questioning of suspects;
(e) lower standards of admissibility of confession evidence in the Diplock Courts;
(f) the rules on the right of silence;
(g) the absence of a jury in the Diplock Courts.

These factors are examined below.

57. The Diplock Courts were set up in 1973[58] to deal with "scheduled" offences[59], that is to say offences alleged to be connected with terrorism. A single judge, sitting without a jury, acts as the tribunal of fact and law. Standards of admissibility of confession evidence are lower than in the ordinary criminal courts, and since the coming into force of the Criminal Evidence (Northern Ireland) Order 1988, the judge may draw such inferences as he sees fit from the accused's failure to answer questions in police custody or to testify in his or her own defence at trial[60]. However, the Diplock Courts, as well as having these special features, function within a framework of emergency laws which have an effect on the administration of criminal justice from the point of arrest onwards. For this reason, the issue of the importance of access to lawyers must be examined within a broader context than merely that of what takes place in court. In the rest of this submission, "the Diplock Court system" is taken as subsuming this broader context.

58. Access to lawyers in Northern Ireland is itself affected by the conflict there. Many suspects detained under the emergency laws have reported that police officers have threatened not only them but their lawyers with sectarian attacks, and have attempted to dissuade them from consulting the solicitor of their choice. One solicitor has been murdered by loyalist paramilitaries amid accusations of government collusion.[61]

59. Under emergency laws in the United Kingdom rights of detainees to legal advice are restricted. A suspect detained under the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA) has the right to see a solicitor, but access to the solicitor can be

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58 Under the Emergency Powers Act 1973

59 Now listed in Schedule 1 of the Northern Ireland (Emergency Provisions) Act 1991

60 These provisions also extend to the ordinary criminal courts, but their effect is compounded by the fewer safeguards and stricter regime inherent within the Diplock system

61 See *HUMAN RIGHTS AND LEGAL DEFENSE IN NORTHERN IRELAND: The Intimidation of Defense Lawyers, The Murder of Patrick Finucane*, Lawyers Committee for Human Rights, New York, February 1993

deferred for up to 48 hours if a senior police officer reasonably believes that such access will interfere with the investigation, alert other suspects, or hinder the prevention of an act of terrorism[62].

60. Provisions concerning access to solicitors differ between jurisdictions. In England and Wales, where access is governed by the Police and Criminal Evidence Act 1984 (PACE), once a solicitor is allowed to see a client, access continues to be granted on request, and the solicitor is allowed to remain present during police interviews. In Northern Ireland, where the Northern Ireland (Emergency Provisions) Act 1991 (EPA) applies, the initial deferral of access for 48 hours can be renewed for further periods of up to 48 hours, and solicitors are never allowed to remain with their clients during police interrogations. There is thus a wholly separate regime from that of ordinary criminal justice for those detained under the PTA in Northern Ireland.

61. Access in practice also differs between jurisdictions. In England and Wales, solicitors are very rarely denied access for as long as 48 hours; no recent statistics are available, but experienced practitioners report that access is usually granted within six hours of the arrest. In Northern Ireland, deferral of access has been frequently used and has led to much litigation by way of judicial review. Between 1987 and 1991, access to lawyers was deferred in 58% of all PTA detentions, on average. This rate of deferral fell to 26% in 1992, 14% in 1993 and 15% in the first three quarters of 1994[63], as a result of a number of successful legal challenges of deferrals.

Prolonged detention

62. In both England and Wales and Northern Ireland the PTA sanctions prolonged police detention[64] for up to seven days before a detainee must be charged and produced before a court, or, as happens in the majority of cases, released without charge[65].

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62 England & Wales: s.58 (8) Police and Criminal Evidence Act 1984, as modified by subsections (13)(d) and (e). Northern Ireland: s. 45 (8) Northern Ireland (Emergency Provisions) Act 1991

63 Northern Ireland (Emergency Provisions) Acts: Statistics, Northern Ireland Office, Table 12

64 Section 14 (4) and (5), Prevention of Terrorism (Temporary Provisions) Act 1989

65 Only around one quarter of those arrested under the PTA are ever charged with any offence. For example, between April and September 1994, according to Northern Ireland Office statistics, 832 people were arrested but only 204 (24.5%) were charged

63. Such prolonged detention has been found by the European Court of Human Rights to be in breach of Article 5 of the European Convention on Human Rights[66], which provides that arrested persons must be brought promptly before a judge, as a result of which the United Kingdom has derogated from Article 5 (3).

64. Access to a lawyer is particularly important where a detainee is kept in prolonged police detention without the safeguard of production before a judicial authority. It is even more so where the government in question has claimed that it is unable to comply with the Convention, and where the police operate under so few other safeguards. As is described below, detainees can be held incommunicado; solicitors may not remain present during police interviews of their clients; the regime of detention is coercive; and there is no audio- or video-recording of such interviews.

Incommunicado detention

65. In both jurisdictions, a detainee can be held completely incommunicado for up to 48 hours, in that not only can s/he be denied access to a solicitor, but the police need not inform a friend or relative of the fact that the detainee is under arrest[67]. As is explained above, in practice these rules are applied more harshly in Northern Ireland than in England. In the latter jurisdiction, solicitors usually gain access to their clients within a matter of hours, whereupon they can give the detainee and the family news of one another. In Northern Ireland, the RUC usually informs the solicitor of the fact that a detainee has requested his or her presence fairly promptly, even if s/he is told in the same breath that access is to be deferred. The solicitor will often be in a position to inform the family of the arrest, but until such time as s/he sees the client, cannot impart any information as to his or her well-being. Furthermore, once the solicitor does gain access to the client, it is only for the duration of one interview, after which a further deferral of access may be imposed for up to 48 hours. The detainee inevitably experiences a severe sense of isolation in such circumstances.

66. Incommunicado detention is wholly antipathetic to international norms on the protection of the rights of detainees. It provides shelter for every form of abuse of process, including physical ill-treatment. During the United Nations Committee Against Torture's examination of the United Kingdom's periodic report in November 1991, Peter Burns, the country rapporteur, observed:

> "Detainees in Northern Ireland could be held for 48 hours without charge, and then upon application for a further five days. Studies had shown that torture most frequently

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66 Brogan & Ors v UK ECrtHR Series A No. 145

67 England and Wales: s. 56 (2) Police and Criminal Evidence Act 1984, as modified by subsection (11). Northern Ireland: s.14 Northern Ireland (Emergency Provisions) Act 1987

occurred during the first 48 hours of detention. During the first 48 hours, detainees could be denied access to counsel, which effectively constituted incommunicado detention. This met all the necessary conditions for abuse by the authorities to take place."[68]

Conditions in detention

67. The regime generally in the three holding centres designated exclusively for imprisoning people detained under the emergency laws is coercive[69]. When not being interrogated, detainees are held in solitary confinement, without any access to reading matter, radio or television. They are not allowed to make telephone calls, or to receive visits, even from a religious adviser. Cells are small, sparsely furnished, and have no natural daylight or integral sanitary facilities. Exercise is not usually permitted and there are many complaints about the quality of the food. Smokers are deprived of cigarettes. Apart from a visit from a police doctor, a detainee will see and speak to no-one other than police officers, until such time as s/he is allowed to see a solicitor. In the most severe cases, the only contact with the outside world afforded someone detained for the full seven days permitted may be just three consultations with a solicitor.

68. The pattern of police interrogation, which can take place at any time between 8:00 am and midnight provided meal breaks are allowed, tends to be intensive, especially during the first 48 hours, when a suspect can be interviewed as often as a dozen times, up until as late as midnight. Such a regime is designed to coerce confessions from detainees, and is also used, quite illegally, to obtain intelligence from those detained about themselves, their families, and their acquaintances. Detainees under the emergency laws in Northern Ireland, who in the eyes of the law are innocent of any crime and most of whom are indeed released without charge, are treated far worse than convicted criminals.

69. There are many situations in such a regime which may give rise to complaints, but the fact that a detainee may only see his or her solicitor at 48 hour intervals severely restricts the ability of a lawyer to act effectively upon such complaints. Where such complaints relate to matters such as allegations of ill-treatment, or withholding of medication, lack of access to a lawyer may have serious consequences.

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68 United Nations press release HR/2955, 13.11.1991 (morning), p. 5

69 In 1982, Amnesty International concluded that the regime of detention in the holdings centres in Northern Ireland constituted a breach of Article 14 (3) (g) of the ICCPR - *The Diplock Courts in Northern Ireland: A Fair Trial?* Netherlands Institute of Human Rights SIM, Special No. 3 - this conclusion holds good today.

70. In its most recent report on conditions of detention in Northern Ireland, the European Committee for the Prevention of Torture concluded:

> "110. I the light of all the information at its disposal, the CPT has been led to conclude that persons arrested in Northern Ireland under the P.T.A. run a significant risk of psychological forms of ill-treatment during their detention at the holding centres and that, on occasion, resort may be had by detective officers to forms of physical ill-treatment."[70]

Such a regime inevitably gives rise to false confessions and allegations of miscarriages of justice. The abrogation of the right of silence can only compound such problems.

Scrutiny of the police

71. Police behaviour in the holding centres comes under only the most minimal scrutiny. There is no video- or audio- recording of interviews. Interrogations are relayed on a silent television monitor which is supposed to be watched by police officer, but we are is not aware of a single disciplinary or criminal charge brought against any police officer as a result of this surveillance, despite many allegations of ill-treatment made by detainees. Despite a consistent pattern of around 400 complaints against the police annually about detention under the emergency laws, not a single complaint has been upheld in the past six years[71], leaving detainees with no confidence that there is any official concern about what goes on in holding centres.

72. In 1993, Sir Louis Blom-Cooper QC took up his post as Independent Commissioner for the Holding Centres, with the following somewhat equivocal remit:

> "1. The principal purpose of the appointment of a Commissioner is to provide further assurance to the Secretary of State that persons detained in Holding Centres are fairly treated and that both statutory and administrative safeguards are being properly applied. His appointment is also intended to reassure the public that the police have nothing to hide and that persons detained in Holding Centres are not being ill-treated or denied their rights."

73. In March 1995, he published his second annual report[72]. In it he reiterated the call he made in his first annual report for the

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70 Report to the United Kingdom Government on the Visit to Northern Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 20 to 29 July 1993, adopted on 3 March 1994

71 Annual reports of the Independent Commission for Police Complaints, 1988 to 1993.

72 *Second Annual (1994) Report of the Independent Commissioner for the Holding Centres*, submitted to the Secretary of State for Northern

introduction of video- and audio- recording of police interviews, citing the widespread support for such measures from, among others, the Northern Ireland judiciary and the European Committee for the Prevention of Torture. He robustly concluded:

> "I sense that informed opinion in Northern Ireland is becoming more firm in its approach to the problem. Sooner or later the security considerations will be bound to yield to the dictates of both civil liberties and juristic practicalities: the sooner, the better."

He also emphasised the need for immediate access to legal advice[73].

Admissibility of confession evidence

74. In Northern Ireland confession evidence is admissible in cases scheduled under the EPA unless it was obtained under torture, inhuman or degrading treatment, or violence or threat of violence[74], whereas in England a confession must be excluded unless it is proved beyond reasonable doubt, upon representations being made, that it was not obtained by oppression or in consequence of anything liable to render it unreliable[75]. The lower standard of admissibility in Northern Ireland must give rise to concern in view of the coercive regime in custody and the absence of adequate safeguards mentioned above.

75. Because suspects are interviewed in the absence of their solicitors, it is only their word against that of at least two police officers as to what was actually said during the interview. This can cut both ways. Suspects frequently allege that they did not make the admissions attributed to them, or that they were coerced by oppressive interrogation into making untrue statements, while police officers allege that accusations of ill-treatment or improper pressure have been fabricated.

76. John Rowe QC, appointed by the Secretary of State to carry out a fundamental review of the EPA[76], had this to say about the presence of solicitors during police interviews:

> "130. I do not propose that solicitors should be present at interviews. I say that with reluctance. I heard great concern expressed by the legal profession about the fact that they cannot be present. (There is no express rule against it: but the EPA Code does not provide for their presence.) The RUC oppose it...Section 11 [of the EPA], and the courts' interpretation of it, permit lengthy and persistent questioning, probably more so than PACE (NI): to allow solicitors to be

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Ireland, 31 March 1995.

73 Although his specific proposals have been rejected by the legal profession in Northern Ireland, among others

74 Section 11 (2)(b), Northern Ireland (Emergency Provisions) Act 1991

75 Section 76 (2) Police and Criminal Evidence Act 1984

76 *Review of the Northern Ireland (Emergency Provisions) Act 1991*, Cm. 2706, HMSO, February 1995

present at interviews would be contradictory. Putting it another way, the regime of the holding centres contemplates that kind of questioning; but solicitors, quite legitimately, by advising their clients not to answer, would impair that regime...It may be a breach of Article 6 of the Convention. I am not asserting that it is. But I think the whole concept of the holding centre is against the presence of solicitors at interview so long as holding centres last."

While it is disappointing that this formally independent commentator is not prepared to recommend that solicitors should be present during police interrogations, despite that fact that he clearly suspects a breach of the Convention, his reasoning lays out starkly the purpose of excluding solicitors. The danger that confessions will be improperly obtained is manifest.

The right of silence

77. Adverse inferences can be drawn against defendants in the Diplock courts if they exercise their right to remain silent under police interrogation or if they fail to testify in their own defence[77]. For the first three years' operation of these rules, over half of all those detained under the emergency laws had to make the decision whether to remain silent under police questioning without the benefit of any legal advice[78]. Reviewing this provision, Peter Burns of the United Nations Committee Against Torture, expressed the view that

> "The fact that no suspect was entitled to have his solicitor present during interrogation was also a cause for great concern. The arguments put forward to justify the refusal of the right to silence were all the less acceptable because the suspect was deprived of the assistance of a solicitor. To all intents and purposes, the United Kingdom was deliberately setting aside one of the basic protections guaranteed throughout the civilized world. Even the extreme circumstances in Northern Ireland in no way justified such a denial of basic human rights."[79]

78. The Commission has also expressed concern about this situation in the light of the facts in the instant case:

> "72. The fact that, according to the 1988 Order, adverse inferences could be drawn from the applicant's failure to answer questions by the police or to account for certain facts already at the pre-trial stage is an element which made it particularly important for the applicant to be assisted by his solicitor at an early stage."[80]

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77 Criminal Evidence (Northern Ireland) Order 1988

78 See paragraph 61 above. In 1994, 15% of all PTA detainees were denied access to their lawyers during the first 48 hours of police questioning

79 See note 11 above

80 Report of the Commission, adopted on 27.6.1994

It was because of these concerns that the Commission found that the Applicant's right to a fair trial had been violated.

79. The rules on the right of silence in Northern Ireland have serious implications for the roles of judges and lawyers, and were introduced without any consultation with the judiciary or the legal professions.

80. Defence lawyers in Northern Ireland strongly object to the rules on the right of silence. Solicitors report that they create a number of dilemmas, especially where clients are very young, or of low intelligence, or are otherwise vulnerable. Problems can be particularly acute where access to a client has been deferred. In some instances, the client, intimidated by the police caution against remaining silent, will already have made damaging admissions. In others, the line of police questioning may suggest that they have no real grounds for suspicion or any hard evidence against the client. In other cases, the client may already have exercised the right to remain silent and will already be at risk of adverse inferences being drawn if the case comes to trial. In all these situations, it may well be in the client's best interests to advise silence, but solicitors must also advise of the risks attached to doing so. Advising, for example, an eighteen-year-old who has never been arrested before and who is suggestible, anxious, and not very clever, as to whether to remain silent or not is close to impossible.

81. Where a solicitor does advise, or the client chooses, silence in the police station, lawyers and their clients face further dilemmas if the case comes to trial. The client is already at risk of adverse inferences being drawn against him or her. If counsel advises the client to testify, he or she risks being accused of mounting an "ambush" defence, i.e. coming up with a defence which has been concocted during the time spent awaiting trial. Equally, if counsel advises the client not to testify, the court may still draw adverse inferences. In either situation, counsel face difficulty in presenting the defence, since they will have to attempt to predict what inferences the court may draw.

82. Given the inequality of arms between the individual and the state, the right to remain silent in the face of police questioning and at trial are fundamental to the defence, especially in an adversarial system of justice such as there is in the UK. If defence lawyers cannot advise their clients to remain silent without putting them at risk of conviction, their ability to offer impartial advice, and hence their relationship with their clients, is seriously distorted.

<u>The absence of a jury</u>

83. The Diplock courts have no juries. A single judge acts as the tribunal of both fact and law. This leads to a quite untenable situation when the admissibility of a confession is contested. As with a jury trial, a voir dire is entered upon during which the validity of the confession

and the means by which it was obtained are subjected to scrutiny. However, whereas a jury would be excluded from hearing these arguments, a Diplock judge not only hears them but adjudicates upon them. Should he decide that a confession is admissible, he must formally warn himself to disregard anything he heard during the voir dire that would in itself have been inadmissible in the trial proper. Should he decide that the confession is inadmissible, he must warn himself to disregard everything he heard during the voir dire, much of which may have been highly prejudicial to the defendant. Most voir dires in Diplock cases are very lengthy, and completely supersede the trial itself to the point where the voir dire becomes the forum in which the case is actually decided. Many confessions are made in the absence of any access to a lawyer, and this is often cited as a ground, among others, for challenging the admissibility of the confession. In an ordinary criminal case, the chances of conviction before a jury on the basis of a contested confession made in the absence of legal advice and of any other corroboration would be very low indeed. In the Diplock Courts, convictions on such a basis are a commonplace occurrence.

84. While someone charged with an identical offence in England would have the benefit of trial by jury, which is seen as an essential adjunct of the adversarial system of criminal justice developed over the past thousand years in Britain and widely adopted throughout the world, in Northern Ireland trial is by a relatively small number of judges sitting alone. While the Diplock judiciary are undeniably public-spirited and courageous, living as they have under constant threat of terrorist attack, it would be miraculous if some, if not all, of them were not case-hardened, given the small population of Northern Ireland, the even smaller number of people accused of involvement in terrorism, and how few such judges there are. The fact that someone arrested under the PTA will, if charged, be tried in a Diplock Court is a crucial factor which any legal adviser would take into account when counselling his or her client. However, the rules on deferral of access to a solicitor, coupled with the rules on the right of silence, mean that many defendants who come to court will have taken crucial decisions affecting their defence before receiving the benefit of any legal advice whatsoever.

Conclusion

85. For all of these reasons, the importance of access to lawyers in the Diplock Court system cannot be overestimated.

86. Access to lawyers is vital from the point of arrest onwards, since a suspect needs to be aware of the complex legal position regarding the admissibility of confession evidence and the drawing of inferences from silence under police questioning before his or her first interview by the police.

87. Furthermore, the coercive custody and interrogation regime, which the government's own appointee, John Rowe, has characterised as being inimicable to the presence of lawyers, is compounded by incommunicado and prolonged detention and the lack of any adequate safeguards against improper behaviour by the police. Lawyers are the only completely independent persons with whom suspects have any contact during their detention at a holding centre. As such, lawyers act as a crucial link between the detainee and the outside world, in particular his or her family. Access to lawyers is also the only effective safeguard available to detainees throughout their period of detention.